IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 39 OF 1997

1. Shri Govind Sadashiv Marathe, major of age, residing at Chireval, Honda, Sattari, Goa.

2. Smt. Vrinda Govind Marathe, major of age, residing at Chireval, Honda, Sattari, Goa.

3. Smt. Radhabai Hari Joshi, since deceased through legal heirs at serial no. 4 to 11.

4. Shri Madhukar Hari Joshi, major of age, residing at Mala, Panaji, Goa.

5. Smt. Manisha Hari Joshi, major of age, residing at Mala, Panaji, Goa.

6. Shri Pandurang Hari Joshi, major of age, residing at Mala, Panaji, Goa.

7. Smt. Joalita Pandurang Joshi, major of age, residing at Mala, Panaji, Goa.

8. Shri Ravindra alias Babu Hari Joshi, major of age, residing at Mala, Panaji, Goa.

9. Smt. Rashmi Ravindra Joshi, major of age, residing at Mala, Panaji, Goa.

10. Shri Vishnu Ramchandra Marathe, major of age, residing at Honda, Sattari, Goa.

11. Smt. Vilasini Vishnu Marathe, major of age, residing at Honda, Sattari, Goa.

12. Shri Irimbak Ramkrishna Kelkar(since deceased) represented through his legal representatives, major of age, residing near the Masjid, Bapat Galli, Belgaum, Karnataka:

    (a) Mr. Ramkrishna T. Kelkar
    (b) Mrs. Jayashri R. Kelkar, both r/o House No.1813/2, Bapat Galli Belgaum, Karnataka.

    (c) Mrs Nalu Narayan Kale
    (d) Mr. Nayan Kale Both r/o. House No.1814, Bapat Galli, Belgaum, Karnataka.

    (e) Mr. Sadashiv Kelkar
    (f) Mrs. Surekha S. Kelkar Both r/o Plot No.11 & 12 "Krupa-Ashirwad" Housing Board Colony, Farmagudi, Ponda-Goa.

13. Smt. Sudhabai Trimbak Kelkar, major of age, residing near the Masjid Bapat Galli, Belgaum Karnataka.

14. Shri Ramkrishna Trimbak Kelkar, major of age, residing near the Masjid, Bapat Galli, Belgaum, Karnataka.

15. Smt. Ramkrishna Kelkar, wife of Ramkrishna Trimbak Kelkar, major of age, residing near Masjid, Bapat Galli, Belgaum, Karnataka.

16. Shri Bhalchandra Ramkrishna Kelkar(deceased) represented for the purpose of this Appeal by his widow the Respondent No.17.

17. Smt. Sindhu Bhalchandra Kelkar, major of age,

residing at Housing Colony,
Alto Porvorim, Goa. ... Appellants/Original Plaintiffs

versus

1. Shri Dattaram Ramchandra Marathe, major of age, residing at Bambar, Nanode, Nagargaon, Sattari, Goa.

2. Shri Purushottam Atmaram Joshi, major of age, residing at Nagargaon, Sattari, Goa. ... Respondents/Original Defendants

Mr. J. E. Coelho Pereira, Senior Counsel with Mr. J. Godinho, Advocate for the Appellants/Original Plaintiffs.

Mr. S. N. Joshi, Advocate for Respondent Nos.1 and 2.

CORAM : N. A. BRITTO, J.

DATE : 29TH JULY, 2004.

ORAL JUDGMENT

This is Plaintiffs' Second Appeal.

2. There is no dispute regarding the suit property. The suit property is known as "Maloli" or "Maloli Bag" which was surveyed under Old Cadastral Survey Nos.4 and 7 and admeasures 1,44,060 sq. metres.

3. The Plaintiffs claimed that the suit property was surveyed under New Survey Nos. 16/1, 16/2(Part),

17/1(Part), 15/11(Part), 18/1, 2, 3, 4 and 8(Part). However, according to the Defendants, the suit property was surveyed only under New Survey Nos. 18/2, 18/3 and 18/4. Both the parties did not at all produce the Survey Plan as per the New Survey, to substantiate their respective claims.

4. The Plaintiffs claimed the said property, having purchased the same vide two Sale Deeds dated 27th December, 1966 and 13th October, 1967 from its previous owners namely Vassudev Dotu Boto Zoixi and Pandurang Janardan Doto Gadgil, respectively. The Plaintiffs claimed that the said owners had enjoyed the suit property prior to the sale continuously, publicly and uninterruptedly for over 30 years which possession had the effect of consolidating the right of ownership by prescription in the Plaintiffs.

5. The Plaintiffs, therefore, filed the suit, being Regular Civil Suit No.66/83 praying for the eviction of the Defendants from the portions surveyed under Nos. 18/2, 18/3 and 18/4 and also for mesne profits. The claim for mesne profits has been given up by the Plaintiffs now before this Court.

6. The Defendants contested the suit pleading that the property purchased by the Plaintiffs was restricted to 6000 sq. metres which was described under Land Registration No.207. The Defendants claimed the remaining of the suit

property through one Krishna Vishnu Botto Borvo. The genealogy of the said Krishna Vishnu Botto Borvo was given by the Defendants in para 3 of the Written Statement and I do not propose to refer to it herein in detail. Suffice it to observe that according to the Defendants he had three sons namely Keshav, Datto and Shankar. At one place Defendant No.1 claimed that he was a lessee and Power of Attorney Holder of one Sakharam who was the descendant of the said Shankar. At the same time the Defendants stated that since 1948 they were peacefully, openly and continuously possessing the property belonging to the said Krishna B. Borvo. The Defendants further pleaded that they had acquired right to the said property by prescription which they specifically pleaded.

7. The learned Trial Court came to the conclusion that the title and possession of the suit property was that of the Plaintiffs. However, the learned first appellate Court came to the conclusion that the title of the suit property was of the Plaintiffs but the possession was of the Defendants. The learned first appellate Court also came to the conclusion that the Plaintiffs had failed to prove that they were dispossessed from the suit property.

8. As far as the title to the suit property is concerned, the Plaintiffs have in their favour two concurrent findings of the two Courts below. The Defendants

have not challenged the said two concurrent findings of the Courts below either by filing an Appeal or Cross Objections. It may be noted that the title of the Plaintiffs was earlier confirmed, as far as Defendant No.1 is concerned in Civil Suit No.36/73 decided by the learned Civil Judge, Senior Division at Bicholim, by which the Plaintiffs were declared to be the owners of the suit property(surveyed under Nos. 4 and 7) and Defendant No.1 was directed to vacate the portion wherein he had wrongfully trespassed.

9. This Second Appeal was admitted by this Court on two substantial questions of law. First, whether it was right and legal on the part of the learned first appellate Court on the findings rendered to deprive the Plaintiffs of the possession of the suit property, once that the Defendants claim that they were enjoying and possessing the suit property by prescription, which claim and right they have failed to establish in the suit. The second, whether it was legal and justified for the learned first appellate Court to hold that the Plaintiffs had not established or come out with a clear case that they were dispossessed from the suit property and thereby refused the reliefs to the Plaintiffs for they failed to establish that they were dispossessed in the year 1948, when in fact, the case pleaded by the Defendants themselves, that they were possessing the suit property.

10. Mr. J. E. Coelho Pereira, learned Senior Counsel, on behalf of the Appellants/Original Plaintiffs has submitted that the finding of the first appellate Court that the Defendants were in possession from the year 1948 is perverse and, therefore, the said finding also need be disturbed. Mr. Coelho Pereira, learned Senior Counsel submits that the Plaintiffs were handed over possession of the suit property pursuant to the decree in Civil Suit No.36/73 by virtue of warrant of possession dated 10th March, 1975 consequent to which the Plaintiffs were put in possession of the suit property on 14th March, 1975(Exh.DW1/F). Mr. Coelho Pereira, learned Senior Counsel further submits that in any event the Plaintiffs suit having been based on title and the Defendants having not proved any adverse possession the Plaintiffs were bound to put in possession of the suit property irrespective of whether the Plaintiffs had alleged the date of dispossession or not and in support of this submission Mr. Coelho Pereira, learned Senior Counsel, has placed reliance on the case of **Indira** v. **Arumugam and another**((1998) 1 SCC 614).

11. In the above case, referring to Article 65(New) and Article 142(Old) of the Indian Limitation Act, 1963, the Supreme Court observed that the Article 142 had undergone a metamorphic sea change after the same was substituted by Article 65 and referring to Article 65 of the Indan Limitation Act, 1963, the Supreme Court observed that when a

suit is based on title for possession, once the title was established on the basis of relevant documents and other evidence, unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited.

12. On the other hand, Mr. S. N. Joshi, learned Counsel on behalf of the Respondents/Original Defendants submitted that the Defendants have been in adverse possession from the year 1948 and in support of the said submission, Mr. Joshi, learned Counsel, has placed reliance on the case of **Konda Lakshamana Bapuji** v. **Government of Andhra Pradesh and others**(AIR 2002 SC 1012) wherein the Supreme Court observed that an assertion of title must be clear and unequivocal though it need not be addressed to the real owner. The Supreme Court further observed that for reckoning the statutory period to perfect title by prescription both the possession as well as the animus possidendi must be shown to exist but where at the commencement of the possession there is no animus possidendi, the period for the purpose of reckoning adverse possession will commence from the date when both the actual possession and assertion of title by the possessor are shown to exist. Referring to the said Civil Suit No.36/73, Mr. Joshi, learned Counsel placed reliance on the case of **Balkrishna** v. **Satyaprakash and others**((2001) 2 SCC 498) wherein the Supreme Court observed that mere passing of an order of ejectment against a person claiming to be in

adverse possession neither causes his dispossession nor discontinuation of his possession which alone breaks the continuity of possession.

13. In my opinion, as far as this aspect is concerned, I must hasten to add that in the case at hand even assuming that the Defendants were in possession of the suit property, the Plaintiffs were put in possession of the suit property by virtue of the said warrant of possession dated 14th March, 1975 and, therefore, in this case the possession, assuming it was there had come to an end on that day when the Plaintiffs were put in possession of the suit property.

14. In my opinion, the reliance placed on the above cases by Mr. Joshi, learned Counsel is totally misplaced. The aspect of the findings of the learned first appellate Court as regards possession being perverse need to be considered by this Court. This certainly can be done in terms of the proviso below Section 100 of the Civil Procedure Code.

15. The Plaintiffs had pleaded in para 4 of the Plaint that possession was delivered to them on 10th March, 1975(14th March, 1975) through Bailiff of the Court in Civil Suit No.36/73 and that they had been in possession of the suit property since then. All that the Defendants stated was that the said suit pertained only to Land Registration

No.207. They did not dispute the possession being given to the Plaintiffs. A perusal of the warrant of possession shows that it pertained to entire property Maloli(surveyed under C.S.Nos.4 and 7). Therefore, the ratio of the case of **Balkrishna** v. **Satyaprakash and others**(supra) would be clearly inapplicable.

16. Secondly, it must be observed that the Defendants had conceded that the property purchased by the Plaintiffs by virtue of the said Sale Deeds was restricted to about 6000 sq. metres which portion D.W.1, Dattaram Marathe, had attempted to identify on the plan produced by the Plaintiffs(by letter 'X' vide Exh.DW1/T). If the Defendants had conceded the said possession in favour of the Plaintiffs there was absolutely no reason for the learned first appellate Court to have dismissed the suit of the Plaintiffs in its entirety. Thirdly, the finding of the learned first appellate Court that the Defendants were in possession of the suit property from the year 1948 could not have been arrived at, since the possession of the suit property was given to the Plaintiffs on 14th March, 1975. This vital document produced by the Plaintiffs appears to have totally escaped the attention of the learned first appellate Court.

17. The learned first appellate Court came to the conclusion that the evidence of all three witnesses of the Defendants had remained unshaken. I fail to understand as

to how the learned first appellate Court could have come to the said conclusion. As already stated, the Defendant No.1(DW1, Dattaram Marathe) had conceded that the Plaintiffs were in possession of the said area of 6000 sq. metres which D.W.1, Dattaram Marathe, identified by letter "X" on the said plan Exh.DW1/T and which area D.W.2, Purushottam A. Joshi, was unable to identify. D.W.1, Dattaram Marathe, was also unable to say as to when it was separated or who had measured the same. D.W.1, Dattaram Marathe, further had stated that from the year 1948 he was in peaceful possession of the entire property "Maloli" except the portion admeasuring 6000 sq. metres. If, D.W.1, Dattaram Marathe, had stated that he was in possession of the entire property, except the said portion of 6000 sq. metres area, D.W.2, Purushottam made an attempt to explain, contrary to what D.W.1, Dattaram Marathe, had stated, that the area in his possession was about 22,130 sq. metres which area was towards the south of the property and approximately same area was in possession of the Defendant No.1 which towards north of the property, the property of the Plaintiffs coming inbetween the said two portions separately enjoyed by them. However, it must be noted that that was not at all the case pleaded by the Defendants in their written statement. The Defendants and particularly Defendant No.1 did not produce any lease deed referred to by him. Admittedly, the Plaintiffs were owners by title of the suit property and it

is well said that possession follows title. In my opinion, the learned first appellate Court ought not to have accepted such evidence as led by the Defendants to come to the conclusion that the Defendants were in possession of the suit property from the year 1948, once it was proved that the Plaintiffs had proved that they were put in possession of the entire suit property on 14th March, 1975.

18. As far as the cause of action is concerned in filing the suit, the Plaintiffs had stated that the cause of action had arisen in their favour in June, 1972. Although, the Plaintiffs had not stated as to when they were dispossessed after the Plaintiffs were put in possession of the suit property on 14th March,1975, the said dispossession could have taken place only after they were put in possession of the suit property on 14th March, 1975. In any event, the Defendants having failed to prove adverse possession against the Plaintiffs, the suit was bound to be decreed against the Defendants based on the principle laid down by the Supreme Court in the case of **Indira** v. **Arumugam and another**(supra).

19. In view of the above, the Judgment/Decree of the first appellate Court deserves to be disturbed and set aside and that of the trial Court partly upheld. Consequently, the suit filed by the Plaintiffs deserves to be decreed in

terms of prayers of para 19(1) and (4) of the Plaint. The Defendants to pay to the Plaintiffs costs throughout.

N. A. BRITTO, J.

RD.